

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Andrew Becker)	FOIA Control No. 2016-289
)	
On Request for Inspection of Records)	FOIA Control No. 2016-661

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 2017**Released: August 10, 2017**

By the Commission:

1. By this Order we deny two Applications for Review by Andrew Becker seeking review of the Public Safety and Homeland Security Bureau's (PSHSB) response to his Freedom of Information Act (FOIA) requests. We conclude PSHSB conducted a reasonable search for records.

I. BACKGROUND

2. The FOIA and Commission regulations give the public the right to request that an agency produce records that are not routinely available for public inspection.¹ Generally, the agency must conduct a reasonable search and produce the requested records unless the agency determines that one or more of the FOIA's nine statutory exemptions apply.² The FOIA and Commission regulations also provide that the requester may appeal any adverse determination related to their FOIA request.³

3. On January 21, 2016, Mr. Becker filed a FOIA request seeking:

Any and all records, reports, audits, memos, evaluations, assessments, briefing documents, planning reviews and/or implementation papers and oversight related to the FCC's involvement with the use, deployment, and distribution of International Mobile Subscriber Identification (IMSI) catchers and/or cell-site simulators, radio scanners and other surveillance devices including but not limited to mobile, aerial and/or fixed platforms, along US borders involving the Department of Homeland Security, including but not limited to the US Border Patrol, as well as the Department of Justice, including but not limited to the Drug Enforcement Administration, from 2001 to present. Specific records of such involvement should include, but not be limited to, California, Arizona (Tucson area), and Texas (Del Rio/Eagle Pass area) and elsewhere on the Southwest Border, as well as Norther[n] Border states. Any and all records pertaining to Digital Receiver Technology equipment, contracts, licenses, testing, deployment, auditing, oversight.⁴

4. Mr. Becker's request was assigned FOIA Control No. 2016-289. In discussions with Commission staff, Mr. Becker subsequently narrowed the scope of his request to "all agency records related to FCC involvement with the use, deployment and distribution of any devices from law

¹ 5 U.S.C. § 552(a)(3); 47 CFR § 0.461.

² 5 U.S.C. § 552(a)(3),(b); 47 CFR §§ 0.457, 0.461(f).

³ 5 U.S.C. § 552(a)(6)(A); 47 CFR § 0.461(j).

⁴ FOIAonline Filing, Andrew Becker, FOIA 2016-289 (filed Jan. 21, 2016) (FOIA 2016-289).

enforcement surveillance by the Department of Homeland Security and the Department of Justice along the US borders from 2001 to present.”⁵

5. On June 1, 2016, PSHSB responded to Mr. Becker stating that it had not located any responsive records. Specifically, PSHSB stated, “[W]e have found no records indicating that the FCC is involved in law enforcement surveillance activities conducted by DHS and DOJ along the U.S. border.”⁶

6. Mr. Becker filed a second FOIA request on May 31, 2016, seeking:

[A]ny and all of the aforementioned [in FOIA 2016-289] records . . . held by, created by, reviewed by, sent and/or received by [PSHSB staff member] Paul Coburn. I also seek any and all training materials, demonstrations, deployment, guidelines, regulations, rules and the like relating to the aforementioned equipment for use in a public safety and/or law enforcement/national security context/environment. I also seek any and all travel records relating to such efforts by FCC technicians, engineers and other related job positions for public safety and/or enforcement training/demonstrations/deployment along the U.S.-Mexico border and any other materials related to said training, demonstrations and/[or] deployment.

7. This request was assigned FOIA Control No. 2016-661.⁷ In responding to this second FOIA request, PSHSB stated that it had located approximately 135 responsive records.⁸ PSHSB produced 108 of those documents to the requester. Those produced documents included travel records, notes, symposium schedules, and publicly available technical specifications. The remaining documents were withheld under FOIA exemptions 6 (protecting personal privacy), 7(C) (protecting privacy of persons mentioned in law enforcement records), and 7(E) (protecting law enforcement techniques and procedures).⁹

8. Mr. Becker appealed both the response to FOIA 2016-289,¹⁰ as well as the response to FOIA 2016-661.¹¹ In appealing FOIA 2016-289, the entire relevant portion of Mr. Becker’s appeal states, “I’m writing to appeal FCC response to my request 2016-289. I am writing on the grounds that I believe an insufficient search and review was conducted.”¹² For FOIA 2016-661, Mr. Becker initially appealed, stating only, “I want to appeal this response based on insufficient search.”¹³ Mr. Becker later articulated his grounds for appeal as “I’m appealing my response as insufficient as I specifically asked for records pertaining to Paul Coburn and his involvement with the subject matter and agencies involved in my original request. I have no indication that his records were sufficiently searched, besides travel records.”¹⁴

⁵ Letter from Zenji Nakazawa, Chief, Policy and Licensing Division, PSHSB, Federal Communications Commission, to Andrew Becker, at 1 (June 1, 2016).

⁶ *Id.*

⁷ FOIAonline Filing, Andrew Becker, FOIA 2016-661 (filed May 31, 2016) (FOIA 2016-661). Mr. Becker captioned this second request as a supplement to FOIA 2016-289. However, as the request asked for materials beyond the scope of what was requested in 2016-289, Commission staff entered the item as a new FOIA request and assigned it a separate control number.

⁸ Letter from Zenji Nakazawa, Chief, Policy and Licensing Division, PSHSB, Federal Communications Commission, to Andrew Becker (January 9, 2017).

⁹ *Id.* Mr. Becker does not appeal any of these withholdings/redactions.

¹⁰ E-mail from Andrew Becker to FOIA-Appeal@fcc.gov (Aug. 10, 2016) (FOIA 2016-289 Appeal).

¹¹ E-mail from Andrew Becker to FOIA-Appeal@fcc.gov (Feb. 22, 2017) (FOIA 2016-661 Appeal).

¹² FOIA 2016-289 Appeal.

¹³ E-mail from Andrew Becker to Ryan Yates, Attorney Advisor, Federal Communications Commission (Feb. 2, 2017).

¹⁴ FOIA 2016-661 Appeal.

9. Commission staff contacted Mr. Becker to attempt to ascertain why he believed the search was inadequate. Staff explained that the searches conducted for the requests did include a search of Paul Coburn's records beyond travel records,¹⁵ and described to Mr. Becker how the searches were conducted,¹⁶ subsequently noting that the searches undertaken by PSHSB appeared to comply with the parameters Mr. Becker set in his requests.¹⁷ When staff inquired as to why Mr. Becker believed the search was inadequate, Mr. Becker stated, "I have records from DHS that indicate FCC, including Paul Coburn, has assisted in selecting equipment for the US Border Patrol to use in conducting surveillance along the US-Mexico border as well as training the Border Patrol on how to use this equipment."¹⁸ Staff requested that Mr. Becker provide a copy of the records from the Department of Homeland Security (DHS) in order to aid PSHSB in its search, noting that without the records, it would be difficult for PSHSB to determine exactly what records Mr. Becker believed the Commission possessed.¹⁹ Mr. Becker refused to provide the documents or additional details to Commission staff to aid in the search.²⁰

II. DISCUSSION

10. We conclude that PSHSB conducted a reasonable search in response to Mr. Becker's FOIA requests. His appeals challenging the adequacy of these searches are, therefore, denied.

11. The FOIA requires that an agency make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."²¹ Here, PSHSB satisfied that standard. As explained to Mr. Becker by Commission staff, PSHSB, in cooperation with the Office of the Managing Director, "searched for records related to FCC involvement with the use of IMSI catchers, cell site simulators, or scanners by or in conjunction with the Department of Justice and the Department of Homeland Security for surveillance purposes along the border areas."²² We see no reason, and Mr. Becker provides no argument, as to why this search would not be reasonably expected to produce the information responsive to Mr. Becker's requests.

¹⁵ E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Andrew Becker (Feb. 24, 2017).

¹⁶ E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Andrew Becker (Jan. 25, 2017) ("PSHSB asked personnel in the Operations and Emergency Management Division and the Office of the Managing Director to conduct a search. Personnel searched for records related to FCC involvement with the use of IMSI catchers, cell site simulators, or scanners by or in conjunction with the Department of Justice and the Department of Homeland Security for surveillance purposes along the border areas. (OMD searched for and reviewed travel records.) Those records were then checked to ensure they, in fact, did fall within the scope of the request. The remaining responsive documents were reviewed for redaction/withholding under the exemptions of the FOIA.").

¹⁷ E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Andrew Becker (Mar. 2, 2017).

¹⁸ E-mail from Andrew Becker to Ryan Yates, Attorney Advisor, Federal Communications Commission (Mar. 20, 2017, 3:38 PM).

¹⁹ E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Andrew Becker (Mar. 20, 2017, 5:02 PM).

²⁰ E-mail from Andrew Becker to Ryan Yates, Attorney Advisor, Federal Communications Commission (Mar. 20, 2017, 5:37 PM).

²¹ *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

²² E-mail from Ryan Yates, Attorney Advisor, Federal Communications Commission, to Andrew Becker (Jan. 25, 2017).

12. The only support Mr. Becker offers for this contention is his claimed possession of a document from DHS showing that the Commission assisted in selecting certain monitoring equipment.²³ However, just because PSHSB's search did not uncover records related to this alleged DHS document does not mean the search was inadequate. "[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search."²⁴ PSHSB's search was reasonable; the failure to locate a specific document does not negate that conclusion. As explained to Mr. Becker by Commission staff, the Commission may have never possessed any responsive records (*e.g.*, if the putative consultation with DHS was done by phone or in person), or the records may have since been disposed of in accordance with established records schedules.²⁵

13. We also emphasize that Mr. Becker refuses to share this alleged DHS document with Commission staff, or provide any details that would allow staff to effectively search for any related records. The FOIA requires the agency to carry out a reasonable search; it does not require that the Commission's FOIA staff "exercise 'clairvoyant capabilities'."²⁶ PSHSB cannot be faulted for failing to determine what documents Mr. Becker believes the Commission should possess.

III. ORDERING CLAUSE

14. ACCORDINGLY, IT IS ORDERED that the Applications for Review filed by Andrew Becker ARE DENIED. Mr. Becker may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).²⁷

²³ E-mail from Andrew Becker to Ryan Yates, Attorney Advisor, Federal Communications Commission (Mar. 20, 2017, 3:38 PM).

²⁴ *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

²⁵ E-mail from Andrew Becker to Ryan Yates, Attorney Advisor, Federal Communications Commission (Mar. 20, 2017, 5:02 PM).

²⁶ *Nurse v. Secretary of the Air Force*, 231 F. Supp. 2d 323, 330 (D.D.C. 2002).

²⁷ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect a FOIA requester's right to pursue litigation. OGIS may be contacted in any of the following ways:

15. The officials responsible for this action are the following: Chairman Pai, and Commissioners Clyburn and O’Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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